Supreme Court, U.S.
FILED

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No.

In The
UNITED STATES SUPREME COURT

October Term, 2003

Dennis J. Krystek, *Petitioner*

vs.

University of Southern Mississippi; Horace Fleming, President; Aubry K. Lucas; G. David Huffman; Glenn Terry Harper; Ronald Marquardt; Jerold Waltman, and Lee Gore, *Respondents.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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40 pp.

QUESTIONS PRESENTED

1. Do specifically pleaded and supported allegations of "fraud on the court" present a sufficient question of material fact to defeat employer's motion for summary judgment, where after-acquired evidence shows employer successfully used a false "legitimate business decision" defense to persuade court of appeals to overturn jury trial verdict for employee?

2. Do specifically pleaded and supported allegations of "retaliation" present a sufficient question material fact as to employer's retaliatory animus to defeat employer's motion for summary judgment, where employer breeches express contractual obligations to protected employee and also denies protected employee Constitutional rights to due process?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Dennis J. Krystek, Plaintiff/Appellant;

2. University of Southern Mississippi
Defendant/Appellee;

3. Horace Fleming, President
Defendant/Appellee;

4. Aubrey K. Lucas,
Defendant/Appellee;

5. G. David Huffman,
Defendant/Appellee;

6. Glenn Terry Harper,
Defendant/ Appellee;

7. Ronald Marquardt,
Defendant/Appellee;

8. Jerold Waltman,
Defendant/Appellee;

9. Lee Gore,
Defendant/Appellee;

10. Jon Mark Weathers, Attorney for the
Defendants/Appellants

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II. Certiorari should be granted so that the Court could articulate a clear policy to proscribe the use of a false defense in employment discrimination cases in order to promote out-of-court settlements, to thereby reduce and eliminate unnecessary litigation, and to promote a higher level of voluntary employer compliance with statutory anti-discriminatory public policy.

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No: _____

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Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported. It is attached as an appendix.

The Opinion of the United States District Court for the Southern District of Mississippi is unreported. It is attached as an appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on December 16, 2002 by a Writ of Certiorari under 28 U.S.C. sec. 1254 (1).

STATUTORY PROVISION INVOLVED

The statute construed is Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, which prohibits an employer from taking retaliatory actions against an employee who has previously filed claims of illegal discrimination against the employer.

STATEMENT

A jury in the United States District Court for the Southern District of Mississippi found at trial in 1998 that Petitioner, Dennis Krystek, was fired because of illegal gender discrimination (2:96-C V-218-PG) and he was duly reinstated. The United States Court of Appeals for the Fifth Circuit subsequently reversed (*Krystek v. University of Southern Mississippi, et al.* 164 F.3d 251 (5th Cir.1999), hereinafter *Krystek I*), relying upon the employer's tendered and argued "legitimate business decision" defense. After the 5th Circuit's reversal in *Krystek I*, Petitioner Krystek discovered suppressed inculpatory material evidence that showed his employer's tendered (and relied upon by the 5th Circuit) "legitimate business decision" defense to be false. Additionally, after appellate reversal, Petitioner Krystek experienced several adverse and prohibited retaliatory actions committed by his employer.

Petitioner filed the present suit (*Krystek II*, Appendix B) pleading two federal causes of action: (1) fraud on the Court and (2) illegal discriminatory retaliatory actions (and pendent state claims). The District Court for the Southern District of Mississippi granted summary judgment and dismissed all federal claims on March 28, 2002. The United States Court of Appeals for the Fifth Circuit affirmed the summary dismissal on December 16, 2002. It is from this judgment that Petitioner seeks Certiorari review (Appendix A).

(FACTS-*Krystek I*)

In Petitioner's original gender discrimination case (*Krystek I*)[1], plaintiff produced much evidence at trial showing highly favorable (and discriminatory) employer treatment for each of three female employees[2], all of which subsequently was completely ignored by the 5th Circuit Court of Appeals in *Krystek I*. Krystek further showed highly favorable administrative treatment for Dr. Kate Greene in the form of early approval for tenure and promotion (despite having written nothing that was published during here probationary period) and in the form of four administrative overrides to unanimously negative university committee reviews[3]. This evidence favorable to plaintiff also was not addressed by the 5th Circuit in *Krystek I*.

The trial jury in *Krystek I* also heard the petitioner recount that when he asked his departmental supervisors how they could approve Dr. Green (having less research performance than Krystek) and not him for tenure and promotion, Acting Chair Jerold Waltman replied, "That's a problem. There are different standards for males and females.[4] " This also was brushed aside as a legally "stray remark" by the 5th Circuit in *Krystek I*. Finally, the trial jury in *Krystek I*, also witnessed President Emeritus of the University in his sworn testimony intentionally misrepresent the qualifications of both Greene and Krystek[5] and when questioned about the discrepancy

[1] Only federal claims of illegal gender discrimination were litigated without inclusion of any separate state claims in *Krystek I*. Yet given the sweeping scope of the 5th Circuit's opinion in *Krystek I*, Petitioner fears that the opinion may jeopardize his right to a trial in state court for non-gender related wrongful termination claims.

[2] For one comparator, Dr. Kate Greene, Krystek showed absolutely and unquestionably that for publication work performed during their common probation period, he out-performed the successful female professor. If Greene was to be given credit for her dissertation/book (as the 5th Circuit erroneously does), express policy requires credit to be given in writing at the time of initial hiring of Greene: there was none. The "unrefereed" arguments erected by the employer (and erroneously adopted by the 5th Circuit in *Krystek I*) were merely a smokescreen designed to conceal the fact that Greene had, in fact, written nothing that was published during

between his inflated version of her probationary period performance and what Greene herself testified to, he falsely claimed twice to know Greene's performance record even better than she did (R, pp. 388-89, lines 23-18 and Appendix C herewith). This also was ignored by the 5th Circuit in *Krystek I.* Form the trial jury's perspective, if the employer's chief administrative officer, President Emeritus Aubrey Lucas was seen to misrepresent facts of employee performance and was seen twice falsely under oath to claim to know something that he did not know, the trier-of-fact clearly had more than reasonable justification to disregard the proffered "legitimate business decision" of the employer.

The employer perfected the presentation of its "legitimate business decision" defense at trial with the cumulative testimony of each of the half-dozen employer witnesses who all testified that Krystek simply "...did not meet the standards" for tenure and promotion. But again, the trial jury in *Krystek I* had more than ample basis for rejecting as false the tendered defense because they viewed side-by-side Krystek's and Greene's probationary period accomplishments contained within their documentary tenure and promotion dossiers. Moreover, the jury also viewed the probationary period annual performance reviews, showing that Krystek consistently received high marks for his teaching, research, and service. All of this was also ignored by the 5th Circuit in *Krystek I.* In the fiction that masquerades as legal opinion in

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her abbreviated probationary period. The university effectively waived all probationary publication requirements for Greene. For another comparator (his female putative replacement), Krystek showed that he was more objectively qualified than her by having earned more degrees. This also was ignored by the 5th Circuit in *Krystek I.* Finally, for a third female comparator (Gail Lucas, a cousin to employer President Emeritus Aubrey Lucas), Krystek showed that employer favoritism allowed her to be promoted to the same academic rank as Krystek, even though she lacked a requisite Ph.D. and also had much less responsibility and requirements than did Krystek. This also was ignored completely by the 5th Circuit in *Krystek I.*

[3] The four highly administrative overrides that Dr. Greene received that were ignored by the 5th Circuit in *Krystek I.* Furthermore, the fact that they were concealed from the EEOC by the employer attorney, entitled Krystek

Krystek I, the 5th Circuit took away Krystek's jury verdict by ignoring every piece of evidence he presented at trial, drew all favorable inferences erroneously only in favor of appellant employer, brushed aside Krystek's direct evidence of discriminatory intent by calling it "legally stray," and ultimately substituted its judgment for that of the trial jury. Krystek did not appeal the case further.

(FACTS-*Krystek II*)

The present petition brought to this court by this request for certiorari contains two distinct federal causes of action: (1) fraud on the court, and (2) illegal retaliation against an employee (and pendent state claims). As to the first cause, after-acquired evidence revealed first, that Acting Chair Waltman had perjured himself at trial regarding his statement, "That's a problem. There are different standards for males and females." Second, after-acquired evidence in the form of sworn testimony made by the employer through Department Chair Ron Marquardt before the state unemployment authority revealed that Krystek had been subjected to tenure review based upon some new and secret standard, which was promulgated through a "directive" issued by Vice President G. David Huffman[6]. This existence of this "directive" was improperly (applied only to Krystek) was previously concealed from Krystek, from the EEOC, and

to the reasonable inference that his employer knew they were improperly granted to Greene. The employer's attorney even stated in his closing argument at trial the importance of the administrative overrides when he said, "And it also-the idea arose at the departmental level: 'We don't think you're going to make it through the college advisory committee. Those people up there are tough.' (R p. 434, lines16-19). The 5th Circuit completely ignored the fact that Krystek was made to run the gauntlet of these "tough" committees while the administrative skids had been greased so that Greene did not.

[4] In sworn testimony, the speaker of those words recounted a different content and context for those words than did Krystek. Based upon the trial jury verdict, the jury obviously chose to believe Krystek's versions of the words.

[5] President Emeritus Lucas overstated and exagerated probationary period

from the trial and appellate court in *Krystek I* through the prevarication of all hostile witnesses (including Vice President G. David Huffman) who simply testified that Krystek "had not met the standards."

Krystek II's second cause of action is against his employer for four specifically pleaded retaliatory actions taken against him. His employer sought and was awarded court costs from the 5th Circuit's erroneous reversal in *Krystek I* contrary to employer nonretaliation policy. Second, in terminating Krystek, the employer breeched express contractual protections requiring proper notice and timing for termination. Third, though never notified that he was being terminated for any alleged misconduct, the employer first raised this allegation only after Krystek was terminated, successfully (and wrongfully) interfering with and depriving Krystek of unemployment compensation. Finally, again with no notice or hearing, the employer deprived Krystek of earned retirement credits within the state retirement system. Krystek presently asserts on this certiorari request that a trier-of-fact as a matter of law may reasonably infer retaliatory animus by the employer from the specific actions taken against Krystek as described in his well-pleaded petition and supporting documents.

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work of Greene and understated that of Krystek.

[6] When asked if such a (tenure-by-ambush) practice was "fair," Marquardt replied, "No."

[7] The word "fraud" or phrase "fraud on the court" does not even appear anywhere within the text of the 5th Circuit's ruling which summarily dismisses Petitioner's fraud on the court claim.

[8] Further evidence supporting the hypothesis of suborned perjured testimony is that Waltman has not been disciplined by the employer in response to his post *Krystek I* revelation and currently Dr. James Pat Smith, the coworker who told Krystek about Waltman's revelation is under an administrative "gag order" not to talk with Krystek or his counsel. Smith has even retained his own counsel even though he is not a party and is merely a material witness.

[9] These secretly changed tenure standards were enforced against Krystek

LEGAL ARGUMENT

I. This Court should grant certiorari because the Fifth Circuit Court of Appeals continues to depart from the accepted and usual course of judicial proceedings by erroneously continuing to substitute its own judgment for that of the trier-of-fact in employment discrimination cases in a manner inconsistent with other circuits and this Court's own recent teachings as held in *Reeves v. Sanderson Plumbing, Inc.*

FRAUD ON THE COURT CLAIM

In order to survive against the employer's motion for summary judgment, the 5th Circuit's rhetorical standard is "...that a summary judgment is properly granted only if there is no genuine disagreement as to any material fact. An issue is material if its resolution could affect the outcome of the action. In deciding whether a fact issue has been created, we must view the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party" (*Hathcock v. Acme Truck Lines, Inc.* 262 F.3d 522 (5th Cir. 2001)). The Supreme Court also defines a material fact as one that affects the outcome of the case (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In *Krystek II*'s fraud on the court claim, the defendant

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by his main campus departmental peers, the same peer administrative group erroneously found by the 5th Circuit in *Krystek I* to be "helpful" toward Krystek because they agreed to read his written drafts of articles. Dr. Greene, on the other hand, benefitted from real departmental "helpfulness" with "skid greasing" for the four administrative overrides to negative committee votes that she received.

[10] If the University now denies that there was a "directive" from Huffman, then because Marquardt allegedly said that there was a directive under oath (as specifically pleaded in *Krystek II*), it necessarily supports the pleaded allegation and inference that Marquardt testified falsely at Krystek's unemployment compensation hearing (see discussion below).

[11] The 5th Circuit in *Krystek II* also fails to address the specifically pleaded allegation that the employer's attorney concealed from the EEOC not only tenure-by-ambush for Krystek, but also the material and inculpatory fact

employer denies both specifically pleaded accusations that support his claim: (1) Waltman's perjured testimony and (2) the vice presidential directive that secretly changed tenure review standards. These are genuine issues of material fact that if proven by a preponderance of the evidence at trial would allow a trier-of-fact reasonably to conclude that the employer university had fraudulently tendered a legal defense known to be false to the court. Yet the 5th Circuit in granting summary judgment to the employer does not even address the issue[7].

Krystek II asserts that the employer's "legitimate business defense" which ultimately (and erroneously) prevailed in *Krystek I* was manufactured and implemented by employer legal counsel. The civil perjury charge against Waltman in *Krystek II* is a serious charge in and of itself that was not addressed by the 5th Circuit. Given the materiality of the statement, its inculpatory power, and the pleaded fact that Waltman seemingly freely and jokingly admitted after the 5th Circuit's reversal in *Krystek I*, at least creates the prospect as a question of fact that his perjured testimony (which attempts to blur content and context of the statement) may have been suborned in furtherance of an effort to manufacture legal "strayness[8]" as a vital component to the larger manufactured false "legitimate business decision" defense. Indeed, Waltman's best defense to the charge may be that he

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that Dr. Greene had received the benefit of four administrative overrides to negative tenure committee votes. The attorney had an obligation to disclose this under the Mississippi Rules of Professional Conduct as incorporated to the 5th Circuit via Rule 83.5 of the Rules of the United States Courts for the Southern District of Mississippi. (See also Model Rules of Professional Conduct Rule 3.1 et seq (1989)). Moreover, Krystek filed an internal complaint against the university attorney for violating the written employer policy requiring honesty by faculty and administrators alike. President Horace Fleming denied the request for review and thereby prevented any internal inquiry into the matter (see *Krystek II* petition). See also Lanctot, Catherine J. "The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases." 43 Hastings L.J. 57 note 175 (1991). This intentional concealment of inculpatory evidence by the employer attorney rises beyond mere witness dis-

was so instructed to testify falsely by the employer attorney. These are all inferences favorable to the nonmoving party that the 5th Circuit erroneously declines to make.

In addition to the completely ignored issue of material fact of Waltman's allegedly perjured testimony, the 5th Circuit in *Krystek II* also completely ignores specifically pleaded new evidence in the form of sworn testimony from the employer (Dr. Ron Marquardt), that Krystek never stood a chance at gaining tenure approval because he was subjected to secretly propagated and secretly implemented new tenure standards in response to the Vice Presidential "directive[9]."

The tendered "legitimate business decision" defense was operationalized at trial with the prevaricated testimony of all employer witnesses, who simply stated that Krystek did not meet the standards while each hostile witness (including Huffman) concealed through prevarication that the standards had been secretly changed via the Huffman directive[10]. The law on this point is clear. Even the 5th Circuit has condemned prevaricated testimony, holding that "...a well-established tenet of tort law proclaims that one who voluntarily elects to make a partial disclosure is deemed to have assumed a duty to tell the whole truth, i.e., to make full disclosure, even through the speaker was under no duty to make the partial disclosure in the first place" (*Union Pacific*

sembling and entitles Petitioner in *Krystek II* to the favorable reasonable inference that the employer knew of the utter impropriety of its actions and chose to conceal them.

[12] *Reeves* and *Krystek I* were contemporaneous cases within the 5th Circuit which both experienced the identical erroneous treatment. Both plaintiffs prevailed at trial with jury verdicts. Both plaintiffs had discriminatory remarks made by employer brushed aside on appeal as being legally "stray." And in both cases, the 5th Circuit completely disregarded material plaintiff-employee evidence produced at trial (See *Krystek I* Facts supra).

[13] In addition to seeking reversal of lower court rulings in *Krystek II*, petitioner urges this Court to consider the entire case, including *Krystek I* for certiorari review (*Christianson v. Colt Industries Operating Corp.* 486 U.S. 800, 817 (1988)).

[14] The resulting examiner's finding that Krystek had been terminated for

Resources Group, Inc. v. Rhone-Poulenc, Inc. 247 F.3d 574, 584 (5th Cir. 2001)). When employer witnesses in *Krystek I* voluntarily asserted in their own sworn testimony that Krystek did not meet the standards, they had a legal obligation simultaneously to reveal that there had been a new and secret performance standard implemented and that Krystek had undergone tenure-by-ambush. However, in order to make the "legitimate business decision" work, secretly changing tenure standards for Krystek and tenure-by-ambush had to be concealed. And it was. First from Krystek, then from the EEOC in written report by employer's counsel, and then from the trial court and the court of appeal through mass prevaricated testimony and the misleading appellee arguments from *Krystek I*. Secretly changing standards, tenure-by-ambush, and prevaricated testimony and Waltman's inculpatory admissions are all questions of fact summarily and erroneously dismissed without discussion by the 5th Circuit in *Krystek II*[11].

Finally, the entire tenure process that Krystek underwent may have been illegally constituted. Krystek was a professor on the employer's remote regional campus, yet his tenure was determined by main campus departmental peers. Krystek would ask this court to take judicial notice of the fact that formal policy of the Mississippi State Institutions of Higher Learning Board, the controlling legal authority for

[11] "gross misconduct" resulted in a complete loss of benefits to which Krystek was entitled.

Krystek's employer, requires these determinations to be made on each campus itself (See sworn testimony of IHL Board Director William R. Cleere reported in *Gulf Coast Research Laboratory v. Amaraneni* 722 So.2d 530 , 541 (Miss. 1998)).

By failing even to address the issue, the 5th Circuit necessarily completely disregards all pleaded allegations and supporting affidavits produced by plaintiff. The 5th Circuit also fails to draw any favorable inferences in favor of the non-moving party. Petitioner submits that dismissal of this claim through summary judgment is in direct contravention of principles enunciated by the Court in *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133 (2000). Even without the present allegation of fraud, a change in controlling authority (Reeves) by itself should permit reexamination of 5th Circuit treatment in *Krystek I* (*Hopwood v. Texas* 236 F.3d 256, 272 (5th Cir. 2000)[12] and *United States v. Becerra* 155 F.3d 740, 752-53 (5th Cir. 1998)). Reexamination should be even more compelling with *Krystek II*'s well-pleaded allegations of fraud on the court, but it is not.

Though not cited per se by the 5th Circuit in *Krystek II*, the holding of that court implicitly seems premised upon a tacit misapplication of the "law of the case doctrine.[13]" The 5th Circuit holds that a case may be reexamined if "...(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii)the decision was clearly erroneous and would work a manifest injustice (*United State v. Becerra* 155 F.3d 740, 752-753 (5th Cir. 1998)). Apparently the 5th Circuit does not regard the unanimous Supreme Court rebuke that it received in the *Reeves* case as a significant change in controlling authority to justify revisiting *Krystek I*, even under theory of fraud on the court. As to the "clearly erroneous" criteria, the 5th Circuit requires "extraordinary circumstances" and not just "...mere doubts or disagreement about the wisdom of a prior decision" (*U.S.*

v. Becerra, 756). *Becerra* further articulates that, "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated...strike us as wrong with the force of a five-week old, unrefrigerated dead fish" (Becerra, 756). The reeking in *Krystek I* is so profound that Petitioner can only conclude that the 5th Circuit seems to have severely congested sinuses. If reversal of a trial court jury verdict caused by a false and misleading appellee legal argument is insufficient stench to meet the "clearly erroneous" test, then Petitioner cannot fathom the meaning of the word.

The Supreme Court addressed the issue of fraud on the court directly in 1944 and held that it "...does not concern only private parties. There are issues of great moment to the public in a patent suit" (cites omitted) (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238, 246). The Court continues, "Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more that an injury to a single litigant. ***It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society***" (Emphasis added).

More recently, the Supreme Court has indirectly addressed the issue holding, "Moreover, lawsuits alleging perjury on the stand in violation of the defendant's due process rights ***often raise material questions of fact, inappropriate for disposition at the summary judgment stage*** (emphasis added). The plaintiff's complaint puts in issue the falsity and materiality of the allegedly perjured statements, and the defendant witness' knowledge and state of mind at the time he testified. Sometimes collateral-estoppel principles will permit dismissal at the pretrial stage. ***But if the truth of the allegedly perjured statement was not necessarily decided in the previous criminal verdict, if there is newly discovered evidence of falsity*** (emphasis added), or if the defendant concedes that

the testimony was inaccurate, the central issue will be the defendant's state of mind. ***Summary judgment is usually not feasible under these circumstances.*** C. Wright, Law of Federal Court 493 (3d ed. 1976). ***If summary judgment is denied, the case must proceed to trial and must traverse much of the same ground as the original criminal trial"*** (emphasis added; *Briscoe v. LaHue*, 460 U.S. 325 note 29). Though the Court directs its language at a prior criminal trial, the legal logic of the passage also applies to civil rights litigation.

The problem of employer fabrication in discrimination litigation has existed for at least a decade prior to the Supreme Court's recent *Reeves* decision (See Lanctot, 1991). Though one might hope that the *Reeves* decision would have curtailed erroneous and warrant less granting of judgments as a matter of law to the benefit of employers, *Krystek II* suggests that the discredited practice has simply been driven underground. Despite the nonpublication of the *Krystek II* opinion, most assuredly news of the case's significance will circulate both within and without the employer bar. The unpublished message from the 5th Circuit in *Krystek II* is that even after *Reeves*, employers may still present and prevail with false defenses. Furthermore, *Krystek II* communicates that anyone who mounts even a credible challenge to this dishonesty will have their lawsuits dismissed and be penalized with court costs by the 5th Circuit for even raising the question. Though the Supreme Court has ruled that the prospect of facing punitive damages for recurrent constitutional violations *should* provide an effective means of deterrence (*Smith v. Wade* 461 U.S. 30, 36 (1983)), such deterrence works only where legitimate questions of material fact are allowed to go to juries. Petitioner prays that his request for certiorari on his fraud on the court claim be granted.

ILLEGAL RETALIATION CLAIM

To proceed with a claim of retaliation against one's employer, the 5th Circuit has held that the plaintiff must show "...(1) he engaged in protected activity pursuant to Title VII; (2) he suffered adverse employment action; and (3) a causal nexus exists between the protected activity and the adverse employment action" (*Arnold v U.S. Department of the Interior* 213 F.3d 193, 198 (5th Cir. 2000)). In granting summary judgment for the employer, the 5th Circuit does not state which prong of the three-part test Petitioner fails in. Since the employer does not deny either (1) protected activity or (2) adverse employment action, there remains a presumed question of "causal nexus" and retaliatory animus.

The Supreme Court has already held that civil plaintiffs in retaliation and constitutional tort cases do not have a burden of adducing improper employer motive in order to defeat employer's motion for summary judgment. Employer intent is a pure question of fact properly to be decided by the trier-of-fact (*Crawford-El v. Britton* 523 U.S. 574, 589 (1998)). Even the *Reeves* opinion, though, recognizes that there may be cases in which "...no rational fact finder could conclude that the action was discriminatory" (*Reeves*, 148). For *Krystek II*, the question becomes, "Could a fact finder reasonably infer "causal nexus" and retaliatory animus?" In Justice Jackson's famous dissent in *Korematsu*, he stated that a mistake by the Court produces "...a generative power of its own, and all that it creates will be in its own image" what Justice Cardozo described as "the tendency of a principle to expand itself to the limit of its logic" (*Korematsu v. United States* 323 U.S. 214, 246 (1944). The employer's ability to rely successfully upon perjured and prevaricated testimony and upon false legal argument in *Krystek I* expanded the principle of legally sanctioned lawlessness to the "limit of its logic" as the university proceeded on a "scorched earth" retaliatory policy against Krystek.

Pleaded retaliatory fact #1 (Petition Part III) asserts that employer abridged its contractual duties to plaintiff by not following proper procedure for either (1) proper notification or (2) timely notification. The Supreme Court has already ruled that for a college professor having the requisite number of years of university employment, as did Krystek, "A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown" (*Perry v. Sinderman* 408 U.S. 593, 601 (1972). This contractual protection and the recognized property interest it creates legal obligations by operation of state law (*Board of Regents v. Roth*, 577). Absent any other explanation as to why Krystek's contract was abridged by his employer, the trier-of-fact may infer retaliatory animus (*Reeves*). The 5th Circuit fails to draw this inference in favor of petitioner.

Pleaded retaliatory fact #2 (Petition Part IV) asserts that university counsel violated the express terms of plaintiff's employment contract by proceeding to obtain judgement for costs against Petitioner in response to the reversal in *Krystek I*. The university has a "no retaliation" policy and it clearly breeched that protection and thereby deprived Krystek of specific contractual protections contrary to *Perry*. Absent any other explanation why as to why Krystek's contractual rights were abridged, the trier-of-fact may infer retaliatory animus (*Reeves*). The 5th Circuit once again ignores the teaching of *Reeves* and fails to draw favorable inference toward the non-moving party.

Pleaded retaliatory fact #3 (Petition Part V) asserts that the university wrongfully interfered with plaintiff's right to seek unemployment compensation by falsely representing to the state unemployment authority that Krystek had been terminated for "gross misconduct[14]." Krystek was never informed of any allegation of any "misconduct," especially "gross misconduct" prior to his termination. It was only *after* he was

terminated and applied for unemployment benefits that the university apparently made some secret determination that Krystek had been terminated for ostensible reasons of "gross misconduct." Krystek had a property right established by operation of state law to be entitled to unemployment compensation. The Supreme Court has ruled that, "When protected interests are implicated, the right to some kind of ***prior*** (emphasis added) hearing is paramount" (Regents, 570). The Supreme Court even goes further to state that absent an emergency, "...(the employer) must afford 'notice and opportunity for hearing appropriate to the nature of the case ***before*** (emphasis the Court's own) the termination becomes effective" (*Regents*, note 7). Such a clear breech of Petitioner's due process rights most certainly permits inference of retaliatory animus. Due process notice and hearing are especially mandated where Krystek is pilloried in the press and held up to public ridicule by the university attorney after the reversal in *Krystek I* (Petition Part XVII(4) AppendixB). The Supreme Court again expressly held that for a professor "...where a person's good name, reputation, and honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential" (*Regents*, 573 and *Owen v. City of Independence* 445 U.S. 622, 634 (1980)). (See also *Cleveland Board of Education v. Loudermill* 470 U.S. 532 (1985) for the Court's analysis of pretermination hearings required for due process.) By granting summary judgment for the employer on this issue in *Krystek II*, the 5th Circuit not only fails to draw a favorable inference in favor of the non-moving party, but it tacitly condones post-hoc secret hearings by employers at which time some ostensible reason for termination may be contrived.

Pleaded retaliatory fact #4 (Petition Part VI) alleges that the employer maliciously under-reported Krystek's earned retirement credits to the state retirement authority and, again by operation of secret decision made after termination, stripped him of earned retirement credits for unused sick leave. The only argued defense of the employer is that

Krystek's complaint rests with the state retirement authority and not with the university. But once again, Krystek absolutely has a recognized property interest in his earned retirement credits that cannot be legally deprived from him with out prior notice or opportunity for hearing, so holds the Supreme Court in *Regents, Perry* and *Cleveland Board of Education* cases. The 5th Circuit ignores *Regents,* it ignores *Perry,* and it ignores *Reeves* in erroneously granting summary judgment for the employer. The 5th Circuit erroneous ruling also tacitly authorizes secret dispossession of earned retirement credits by an employer.

Any one of the above fact groups (1-4) would form sufficient basis for inferring retaliatory intent. Not only are they serious abridgements of express contractual rights and breeches of clearly established Constitutional principles of due process, but they are also highly disparate treatment from what is experienced by other professors who have not accused the university of discriminatory actions. When viewed in the totality of their combined circumstances, petitioner far exceeds any thresh hold criteria from which a trier-of-fact may infer retaliatory intent. And once again, even after the guidance by the Supreme Court directed expressly at the 5ht Circuit in *Reeves,* the 5th Circuit continues to substitute its own judgment for that of a trial jury in employment discrimination cases.

II. Certiorari should be granted so that the Court could articulate a clear policy to proscribe the use of a false defense in employment discrimination cases in order to promote out-of-court settlements, to thereby reduce and eliminate unnecessary litigation, and to promote a higher level of voluntary employer compliance with statutory anti-discriminatory public policy.

CONCLUSION

This case presents important questions about the role fo the jury in discrimination cases and about the meaning of fraud on the court. The 5th Circuit Court of Appeals continues to ignore evidence, arguments, and causes of action in granting summary judgments for employers contrary to this Court's ruling in *Reeves v. Sanderson Plumbing Products, Inc.*; therefore, review by this Court is warranted

Respectfully submitted:

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Appendix A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 02-60323
Summary Calendar

DENNIS J. KRYSTEK, APPELLANT

Plaintiff-Appellant,

versus

UNIVERSITY OF SOUTHERN MISSISSIPPI; HORACE FLEMING, President; AUBRY K. LUCAS; G. DAVID HUFFMAN; GLENN TERRY HARPER; RONALD MARQUARDT; JEROLD WALTMAN; LEE GORE

Defendants-Appellees

Appeal from the United States District Court
For the Southern District of Mississippi, Hattiesburg Division

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(2:00-CV-165PG)

Before JONES, STEWART, AND DENNIS, Circuit Judges.
PER CURIAM:[1]

Plaintiff Dennis J. Krystek appeals from the district court's grant of complete summary judgment for the Defendants the University of Southern Mississippi (USM) and its employees in his suit alleging discrimination and retaliation in violation

of Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e, *et seq.*, conspiracy in violation of 42 U.S.C. sec. 1985(3), and pendent law claims.

We review the district court's grant of summary judgement de novo, employing the same criteria used in that court. *Rogers v. International Marine Terminals*, 87 F.3d 755, 758 (5th Cir. 1996). Summary judgment should be granted where the record indicates no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Id.

Here, plaintiff's Title VII discrimination claims were the subject of an earlier suit, *Krystek v. Univ. of Southern Mississippi*, 164 F.3d 251 (5th Cir. 1999), and are claim precluded from consideration. *Southmark Corp. v. Coopers & Lybrand*, 163 F.3d 925, 93 (5th Cir. 1999). The district court correctly granted summary judgment on Plaintiff's retaliation claim becuase he has failed to produce sufficient evidence to create a genuine issue of material fact as to whether the non-discriminatory reason offered by defendants was pretext for a retaliatory purpose. *Rios v. Rossotti*, 252 F.3d 375, 380 (5th Cir. 2001); *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 139 (5th Cir. 1996). Plaintiff also failed to introduce evidence of racial animus on the part of defendants, as required for a conspiracy claim under 42 U.S.C. sec 1985(3). *Horaist v. Doctors Hospital of Opelousas*, 255 F.3d 261, 270-71 (5th Cir. 2001). As all of Krystek's federal calims lack merit, the district court correctly dismissed without prejudice his pendent state law claims. *Bass v. Parkwook Hospital*, 180 F.3d 234, 246 (5th Cir. 1999).

The judgment of the district court is affirmed.

[1]Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. r. 47.5.4.

Appendix B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

DENNIS J. KRYSTEK PLAINTIFF

VS. CIVIL ACTION NO.:_____

DEFENDANTS
THE UNIVERSITY OF SOUTHERN MISSISSIPPI, PRESIDENT HORACE FLEMING, AUBREY K. LUCAS, G. DAVID HUFFMAN, GLENN TERRY HARPER, RONALD MARQUARDT, JEROLD WALTMAN, and LEE GORE.

COMPLAINT

NOW INTO COURT comes plaintiff, Dennis J. Krystek, pro se, and for cause of action against the defendants, University of Southern Mississippi, President Horace Fleming, President Emeritus Aubrey K. Lucas, G. David Huffman, Glenn Terry Harper, Ronald Marquardt and Jerold Waltman, respectively as state agency, state employees, and personally and individually, would state:

IURISDICTION

Plaintiff pro se brings this action pursuant to Title 7 of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 704(a) et seq. and other pertinent sections so that he may seek redress regarding violations of his right to work in an environment that is free of discriminatory and retaliatory animus.

I.

Plaintiff is an adult resident citizen of the County of Hancock, State of Mississippi. The defendant University does business and is a public educational institution on the

Mississippi Gulf Coast in Harrison County and in Hattiesburg (Forrest County), Mississippi. Each of the remaining individual defendants are employees of the University, and based upon information and belief, all of whom reside within Forrest County, State of Mississippi.

II. FACTS OF RETALIATION

Plaintiff successfully litigated a claim for illegal gender discrimination before judge and jury against his employer, the University of Southern Mississippi (hereinafter, the "University") in the United States District Court for the Southern District of Mississippi (2:96-CV-218-PG) and was duly reinstated with no limitations or restrictions as to his employee status to his job as assistant professor on the University's regional campus. On January 14, 1999, the U.S. Fifth Circuit Court of Appeals reversed the lower court judgment and found for the defendant University (164 F.3d 251). Thereafter plaintiff received written notification of his termination (without any stated reasons for termination) to become effective on May 20, 1999.

III.

Plaintiff avers that as a reinstated employee, that he was entitled to all rights, privileges, and protections found within the University's Faculty Handbook. The Handbook permits termination of professors through either non-renewal of contract or for reasons of cause. Plaintiff avers that the University terminated him in a retaliatory manner by not following proper procedures for either type of termination, to wit: plaintiff's notification of termination did not comply with the timely notification requirements needed for non-renewal. Similarly, plaintiff was never informed before his termination date that he was ostensibly being terminated for cause. Moreover, plaintiff had been incorporated into long-term scheduling plans beyond his termination date, agreed to teach summer school beyond his termination date, and even followed instructions to order textbooks for courses

beyond his termination date—indicia that he was not terminated for cause.

IV.

The University and its legal counsel and Special Assistant (Mississippi) Attorney General, defendant herein Lee Gore, exhibited further retaliatory animus against plaintiff by proceeding against him in federal court for plaintiff to bear the University's court costs in the original gender discrimination case. Plaintiff avers that seeking such costs is contrary to "non-retaliation" statements and policies of the University and is disparate in treatment afforded others who have litigated against the University and not been similarly pursued and is therefore retaliatory.

V.

Plaintiff avers that further outrageous, malicious, and retaliatory animus manifested itself when the University through defendant herein Ronald Marquardt falsely represented under oath that plaintiff had been terminated for "willful misconduct" before the Mississippi State Employment Security Commission, further injuring plaintiff by causing the Commission to deny unemployment compensation to plaintiff. Ronald Marquardt knew or should have known that plaintiff was never formally terminated for cause or "willful misconduct" and that plaintiff had never even been informed of such allegations until the time he applied for unemployment compensation, which was well after the date of his termination. Moreover, Ronald Marquardt participated in scheduling plaintiff for continued employment beyond his date of termination—conduct completely inconsistent with even an intent to proceed to terminate plaintiff for cause. Defendant's false sworn misrepresentations damaged the plaintiff and further evidences a retaliatory animus.

VI.

Plaintiff avers further outrageous, malicious, and retaliatory

animus manifested itself after his termination when the Public Employees' Retirement System of Mississippi informed plaintiff that he had less retirement credit than years he had worked for the State of Mississippi. Based upon information and belief, the University had intentionally (and without prior notification or any other due process) and maliciously stripped plaintiff of earned retirement credits within the state retirement system by under reporting his service credits. Moreover, without any prior notification or any other due process whatsoever, the University also summarily and maliciously stripped plaintiff additional retirement credits accruing from his unused sick leave.

VII.

Plaintiff duly filed a complaint of "Retaliation" with the E.E.O.C. within the prescribed time limits and on January 31, 2000 the E.E.O.C. issued letter of permission to sue posted on February 1, 2000. Plaintiff brings this lawsuit within the prescribed time limits.

VIII. FACTS AND ALLEGATIONS OF CONSPIRACY TO DEPRIVE PLAINTIFF OF DUE PROCESS, EQUAL PROTECTION, AND CIVIL RIGHTS

Plaintiff alleges that based upon information and belief acquired before, during, and after the original gender discrimination case, that the named individual defendants to this petition did knowingly engage over a period of time in a common purpose to accomplish unlawful objectives or to accomplish a lawful end by unlawful means, to wit: defendants lied under oath at deposition and trial; defendants prevaricated under oath on the central issue of the case—job performance—with the intent to mislead; defendants knowingly and intentionally concealed relevant, probative, and material evidence from both the EEOC and from the courts, and; defendants intentionally and deceptively misrepresented official University personnel policy and its meanings.

Appendix B

IX. PRESIDENT EMERITUS AUBREY K. LUCAS

Aubrey Lucas knowingly made false and intentionally misleading statements during his sworn trial testimony. On the pivotal issue of comparative performances between a female employee and plaintiff therein and herein, in which the tenured female professor accurately stated that she had written nothing that was published during her probationary period, Aubrey Lucas falsely attributed to the female professor work that had, in fact, not been accomplished during her probationary period. Aubrey Lucas furthermore falsely claimed unambiguously and twice under oath to have superior knowledge than even the female professor about her publication record during her probationary period. Finally, with the objective of making the University's "legitimate business decision" the prevailing argument, Aubrey Lucas testified under oath that the reason plaintiff was denied tenure and promotion was that he ostensibly did not meet the "standards." Based upon information and belief, Aubrey Lucas knew or should have known at the time of trial that his own Vice President, G. David Huffman (named defendant herein) had issued a secret "directive" that changed the ostensible "standards" for tenure and promotion for plaintiff without prior notification to plaintiff at the very time he was applying to his main-campus peers for tenure and promotion. In the "up-or-out" system of tenure and promotion, changing the "standards" by secret directive at the end of plaintiff's probationary period was extremely prejudicial to plaintiff, especially for regional campus professors who are completely dependent upon and especially vulnerable to abuse and impropriety by main campus administrators. Rather than disclose that plaintiff had been subjected to new and secret standards, Aubrey Lucas prevaricated on that pivotal issue of the case.

X. VICE PRESIDENT G. DAVID HUFFMAN

Based upon the sworn testimony of Ronald Marquardt (defendant herein) taken during cross-examination at plain-

tiff's unemployment compensation hearing (after both the adverse court of appeals ruling and plaintiff's subsequent termination), Ronald Marquardt did reveal the existence of a secret, and previously undisclosed "directive" from Vice President Huffman that did change the "standards" for tenure and promotion for plaintiff at the very same time he was applying for tenure and promotion. Because changing the standards of review secretly and without notification at the end of one's five-year probationary period has absolutely neither a managerial nor any motivational theoretical justification, plaintiff avers that such prejudicial treatment is "arbitrary" at best and malicious at worst. It is especially an egregious offense given the complete reliance by plaintiff (and other regional campus professors) upon main-campus administrators for fair-dealing in its complete and exclusive control of tenure and promotion awards. It is also highly disparate (and highly prejudicial) treatment from what the tenured female professor experienced. Vice President Huffman thus prevaricated in his testimony about plaintiff not meeting the "standards" and in furtherance of the University's "legitimate business decision" defense.

XI. COLLEGE DEAN GLEN TERRY HARPER

Dean Harper contributed to the conspiracy against plaintiff by his prevarication about plaintiff not meeting the ostensible "standards." Furthermore, as with the other defendants, Dean Harper breeched his duty for fair dealing in tenure and promotion matters with the plaintiff by making no effort whatsoever to protect the plaintiff, employed on the remote regional campus, from main campus administrative abuse and secretly changing tenure and promotion standards.

XII. ACTING DEPARTMENT CHAIR JEROLD WALTMAN

A key element in plaintiff's reversed case for illegal gender discrimination was a statement made by Acting Chair Waltman. When plaintiff asked Jerold Waltman and Ronald Marquardt at a meeting expressly convened to discuss plain-

tiff's tenure and promotion, how it was that they (the department) could approve (for tenure and promotion) the female applicant (who had written nothing that was published during her abbreviated probationary period) and not the plaintiff, Waltman replied, "That's a problem. There are different standards for males and females." In sworn testimony at deposition and trial, Jerold Waltman repudiated both the content and context of his admission. Indeed for reversal, the Court of Appeals found Waltman's admission to be a "stray remark" and therefore of no legal significance. Yet it was after the Court of Appeals reversal for the University, based upon information and belief that Jerold Waltman did state to one or more other University employees that plaintiff's version of his statement's content and context was correct. Such an admission after-the-fact would mean that Jerold Waltman necessarily knowingly gave false testimony under oath and otherwise perjured himself to the extreme prejudice of the plaintiff. Finally, well before the matter came to original trial, Jerold Waltman denied verbally and in writing ("no raising the bar") and thereby further wrongfully concealed from plaintiff that the standards for tenure and promotion for him had been changed.

XIII. CHAIR RONALD MARQUARDT

Department Chair Ronald Marquardt similarly participated verbally and in writing in denying and wrongfully concealing from plaintiff that the ostensible "standards" for review had been changed in response to the secret vice presidential directive. Plaintiff avers that such concealment evidences full knowledge and understanding of the administrative impropriety and violation of due process involved in secretly changing the ostensible standards of review at the end of a probationary period in an up-or-out tenure system to the extreme prejudice of plaintiff. Plaintiff further avers, based upon information and belief, that the reason his main campus departmental peers failed to protect him from the administrative abuse (or even protest)of the "changing stan-

dards directive" is that these peers utilized the "changing standards directive" to act in a manner consistent with prior behavior in furtherance of a hidden economic conflict of interest. By wrongfully concealing from plaintiff the secret directive, Chair Marquardt breeched his duty to protect plaintiff, as highly vulnerable regional campus professor, from administrative abuse of prejudicial changing of tenure and promotion standards. As with all other University witnesses hostile to plaintiff, Chair Marquardt prevaricated under oath on the issue of plaintiff not meeting the ostensible "standards." Finally, Chair Marquardt misrepresented under oath to the Mississippi Employment Security Commission that there had, in fact, been a bonafide termination of plaintiff by the University for "willful misconduct" while having full knowledge that such false charges had never even been communicated to plaintiff while he was still employed by the University.

XIV. UNIVERSITY COUNSEL AND SPECIAL ASSISTANT ATTORNEY GENERAL, LEE P. GORE

Using an argument of "insufficient evidence," Special Assistant Attorney General and University Counsel Lee P. Gore successfully persuaded the U.S. 5th Circuit Court of Appeals to overturn and reverse the jury trial verdict plaintiff won in the trial court below. However, based upon after-acquired and previously-acquired information and belief, plaintiff contends that Mr. Gore created the very condition (insufficient evidence) about which he successfully complained. His approach was to conceal that which was concealable and then to distort and misrepresent that which had to be revealed in flagrant violation of his statutory duties of candor toward a tribunal, candor toward an administrative agency (the EEOC), and his duty of fairness to opposing party and counsel and Rule 83.5 of the United States Courts for the Southern District of Mississippi. To wit: Mr. Gore's response to the EEOC's request for information (for plaintiff's original gender discrimination complaint) not only mis-

represented and mislead the EEOC investigation through positive statements of fact and policy, but it also conceals from the EEOC the existence and content of relevant, probative, and material evidence that was highly prejudicial to the University and within his (and the University's) exclusive knowledge and control. Specifically, Lee P. Gore concealed four documents from University tenure and promotion committee reviews that stated the female professor did not meet the requirements for either tenure or promotion based upon insufficient publications. Lee P. Gore further concealed the existence and content of four speciously reasoned administrative overrides (two by Dean Glenn Terry Harper and two by Vice President G. David Huffman, both defendants herein) to the negative committee votes. The highly inculpatory evidence wrongfully concealed from the EEOC greatly reduced the likelihood of an adverse finding by the EEOC against the University and is contrary to the Mississippi State legal requirement of candor toward an administrative tribunal.

While still acting under color of law, Lee P. Gore further wrongfully concealed from both the EEOC and the plaintiff during both the trial and appellate phases of his case, the existence and content of the secret Vice Presidential directive that changed the standards for tenure and promotion review in a highly prejudicial manner for plaintiff (but not for the tenured female employee). Plaintiff avers that had this information been properly revealed to both the EEOC and to the Court, that it would have produced a different final outcome to the case as it would have rendered the University's prevailing "legitimate business decision" defense inoperable. Cocounsel with Lee Gore even taunted plaintiff during a trial recess with the words, "Too bad that you don't know what questions to ask."

XV. PRESIDENT HORACE FLEMING

Based upon information and belief, President Horace Fleming has had more than ample opportunity and informa-

tion to investigate plaintiff's allegations of tenure and promotion and retaliatory termination improprieties, yet he has failed to do anything. President Fleming attended plaintiff's original gender discrimination trial. Based upon information and belief, President Fleming has first-hand information and experience with at least one other illegitimate personnel decision made by former Vice President G. David Huffman. Finally, in response to plaintiff's detailed written request to bring formal charges of "Scholarly Misconduct" for "deceptive reporting of research and scholarly activities" by University officials to the EEOC and the courts, President Fleming, blocked internal inquiry by ruling that the University's written requirements for honesty and integrity in reporting research and scholarly activity simply do not apply.

XVI. MISCELLANEOUS MATERIAL MISREPRESENTATIONS

Throughout the course of processing and litigating plaintiff's original claim of gender discrimination, based upon information and belief, each of the adverse parties named above may have engaged in additional misrepresentations of fact and policy in both sworn and unsworn statements than described herein. Failure to further enumerate and describe these herein is not be construed as an absence of their existence or an intention by plaintiff not to use such evidentiary materials in support of his case.

XVII. CLAIMS UNDER STATE LAW

1. In the alternative to pleading wrongful termination for reasons of retaliation, plaintiff avers that he was wrongfully terminated based upon improper denial of tenure and promotion, which was a product of a secret and highly prejudicial change in "standards" in 1994. In a highly collusive main campus administrative environment, plaintiff's departmental peers "took his appeals (preemptively) for him" with both Dean Glenn Terry Harper and Vice President G. David

Huffman (during the course of playing a game of tennis!) thereby depriving plaintiff of any real or effective right of appeal from departmental impropriety. Moreover, a continuing economic conflict of interest among plaintiff's departmental peers tainted their deliberations. Plaintiff accepted the proffered extension under the duress of threat of termination (contrary to misrepresentations made to the Court of Appeals) and to gain more time to pursue internal error correction with President Emeritus Aubrey K. Lucas, who ultimately failed to protect plaintiff from secretly designed and implemented changed standards of review and other administrative abuses.

2. In the alternative to the above stated claim of deprivation of federal rights to due process, equal protection, and civil rights, plaintiff avers that substantially the same evidence and same named defendants individually and personally would be liable to plaintiff for the intentional mass and individual torts of fraud and misrepresentation. Based upon information and belief, Chairman Ronald Marquardt's intentional and outrageous misrepresentation before the State Employment Security Commission that plaintiff had been duly and properly terminated for "willful misconduct" especially fits into this category.

3. Based upon information and belief, the outrageous behavior and fundamental dishonesty that plaintiff experienced at the hands of the named defendants herein—all defendants of a senior status working in a public institution ostensibly dedicated to the pursuit of knowledge and truth—has caused plaintiff to experience deep and profound disappointment and distress.

4. Based upon information and belief, plaintiff was maliciously defamed and experienced further distress by the publication in the Sun Herald and other media of misleading and untrue statements that held plaintiff up to public ridicule and scorn made by Special Assistant Attorney General, Lee P. Gore.

Appendix B

XVIII. RELIEF

Plaintiff asks for any and all equitable and legal relief to which plaintiff may be entitled and such relief that the Trier of Fact may award after due deliberation upon facts, evidence, and law presented. Plaintiff seeks not only lost pay, lost workman's compensation, the cost of lost benefits, and the restoration of state retirement credits, but also court costs, attorneys fees, interest, and punitive damages, and any and all other appropriate relief to which he may be entitled pursuant to appropriate case law or statute.

Respectfully submitted, this the _____day of _____, 2000.

_____

Dennis J. Krystek, Plaintiff Pro se

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1c

Appendix C

KRYSTEK I

EXCERPTED TRIAL TESTIMONY OF
PRESIDENT EMERITUS AUBRY K. LUCAS

Q. — do you dispute that Kate Greene herself testified from that same seat that you are in that she did not publish anything after — between I should say in fairness August of 1989 and May of 1993? Do you dispute that?

A. — I don't remember what Kate Greene said, *and it doesn't matter*. I saw the record. I know what she published and when she published.

Q. Well, sir —

A. You want to get technical on when things happened. That's not what I'm about. I've got to determine whether or not she's done it and the quality of it.

Q. Yes, sir, but are you saying that the same standards that were applied to Kate Greene were in fact as a fact applied to Dennis Krystek? Is that your testimony?

A. Why of course.

Q. That is? And so would you agree that Kate Greene would perhaps have a better remembrance or an idea of what she actually did than you would?

A. **It — remembering doesn't matter**, Mr. Chaze. **I'm trying to tell you I know what's in the record. I *know* what she did *whether she remembers it or not*.**

Q. Well, her vitae the jury can also look at; isn't that correct?

A. Well, I'm sure they can

Q. What is your response to the fact that annual evaluations were so complimentary of Dr. Krystek? Do you have a view on that?

A. Yes, I do. Annual evaluations are important, but let's